Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

WAYMON HOBDY, an individual,

Petitioner,

vs.

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE OF THE STATE OF CALIFORNIA, CHUCK QUAKENBUSH, PATRICIA K. STAGGS, JON TOMASHOFF, JENNIFER CHAMBERS, and DOES 1 THROUGH 19 Inclusive,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal, Second Appellate District, County Of Los Angeles

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in the area of revocation of an individuals occupational license, the right to due process of law under the Fifth Amendment to the U.S. Constitution is clearly established to alert a reasonable public official to its constitutional parameters so that the officials claims of qualified or absolute immunity from suit must be rejected by the Courts?

2. Whether, Respondent Chuck Quakenbush (former Insurance Commissioner) summary judgment motion should have been denied, because under federal law liability should be placed upon supervisory officials under 42 U.S.C. sections 1983 and 1985 when such official is personally involved in the constitutional deprivation of an individuals Fifth Amendment rights of Due Process by: (a) failing to remedy a constitutional violation after learning of it, (b) creating or maintaining a custom or policy which fosters the violation, (c) allowing the custom or policy to continue after learning of it, or (d) authorizing his or her subordinates to sign a document which causes the constitutional deprivation?

3. Whether, under the Constitutional requirements of notice and an opportunity to be heard as set forth in the Fifth Amendment to the United States Constitution, a trial court can enter a judgment in favor of defendant(s) who were never served with process nor appeared in the action?

4. Whether, the Due Process Clause of the Fifth Amendment to the United States Constitution was violated, when the trial court granted Respondent Jennifer Chambers (attorney for the State Department of Insurance)

QUESTION PRESENTED – Continued

Motion for Summary Judgment *on the same day* the trial court permitted this party leave to amend her Answer without affording Petitioner Waymon Hobdy an opportunity to be heard and to respond to the now amended pleading?

PARTIES TO THE PROCEEDING

Petitioner is Waymon Hobdy (MR. HOBDY). Respondents are Chuck Quakenbush (former Insurance Commissioner of the State of California), Jennifer Chambers (Insurance attorney), Kim Williams, Barry Nelson, Michael McAllister, Brian O'Brien, Melinda Aval (Insurance Department Investigators). Additionally, although the following persons were not parties to this present action, the trial court nonetheless entered a judgment and dismissal in favor of the State of California, Department of Insurance of the State of California, Patricia K. Staggs (Insurance attorney), Jon Tomashoff (Insurance attorney), State of California Board of Control, Jennifer McColloch, John Petkovich, Victoria Pham, and Glenise Sibbern (Insurance Department Investigators).

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Waymon Hobdy states that to his knowledge there is no parent company nor wholly owned subsidiary in this action before this Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Waymon Hobdy hereby petitions this United States Supreme Court for a Writ of Certiorari to the Court of Appeals of the State of California.

OPINIONS BELOW

The Opinion of the Court of Appeals in Case No. B153875 is unreported. (Appendix (App.) 1-20). The Petition for Rehearing which was denied by order dated September 22, 2003, is also unreported. (App. 34). The Order of the Supreme denying review in Case No. S120295 is unreported. (App. 35).

STATEMENT OF JURISDICTION

The Judgments of the State Superior Court were entered on August 9, 2001, November 15, 2001, and November 28, 2001. (App. 21-25; 29-30; 31-33, respectively). The Court of Appeals Opinion affirming the trial court's orders and judgments was entered on September 25, 2003, *supra*. A timely Petition for Rehearing was filed and denied on September 22, 2003. *supra*. Thereafter, MR. HOBDY filed a Petition for Review with the Supreme Court of the State of California which was denied (en banc) on December 10, 2003. *supra*. The jurisdiction of this U.S. Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The *Fifth Amendment* to the United States Constitution. (App. 36).[1]

2. The *Fourteenth Amendment*, Section 1, to the United States Constitution. (App. 36).

3. 42 U.S.C. section 1983. (App. 37).

4. 42 U.S.C. section 1985(3). (App. 37).

STATEMENT OF THE CASE

This Petition raises important questions of constitutional and federal law concerning issues of governmental officials being immune from suit. That is, whether in the area of revocation of an individual's occupational licensing (i.e., insurance or other licensure) the right to due process of law under the Fifth and Fourteenth Amendments is clearly established so that a governmental official's claims of qualified or absolute immunity from suit must be rejected by the Courts.

Additionally, this Petition raises significant questions of federal law. Specifically, what factors must the Courts apply to determine whether a supervisory official is personally involved in the constitutional deprivation of an

[1] The pertinent text of these Constitutional and Federal authorities are set forth in the appendix as permitted by Supreme Court Rule 14.1(i)(v).

individual's constitutional rights to subject such official to liability under 42 U.S.C. sections 1983 and 1985.

Finally, this Petition raises issues of Constitutional import in terms of the due process rights of Petitioner and those similarly situated to be protected from the issuance of a judgment by the trial court in favor of non-parties to an action, and a trial court's denial of rights to notice and an opportunity to be heard to respond to a pleading in which the trial court has granted a party a judgment.

In short, this Petition seeks certiorari to the Court of Appeals on the four questions raised herein which as presently ruled on would have a devastating impact on the federal and constitutional rights of litigants.

STATEMENT OF THE FACTS

In 1970, MR. HOBDY was issued a life and disability insurance license by the State of California Department of Insurance. (CT: Vol. 1:000041; 000045-54:4 (10/09/01)).[2] In 1986, MR. HOBDY filed an application for a fire and casualty license, and in 1987, the DEPARTMENT issued to MR. HOBDY the fire and casualty license which he applied for. *Id. MR. HOBDY'S licenses were issued free from any conditions or restrictions. Id.* MR. HOBDY maintained his licenses in good standing and such licenses were never suspended, restricted, modified, or revoked. *Id.*

[2] References will be made to the appellate record below. CT refers to the Clerk's Transcript and RT to the Reporter's Transcript. The facts contained herein are undisputed.

In October of 1995, Respondents *summarily* revoked MR. HOBDY'S over 25-year licensing rights. (CT: Vol. 1:000046-000052:4). Subsequently, MR. HOBDY filed a Petition for a Writ of Administrative Mandamus with the Superior Court which was denied in error, and MR. HOBDY then appealed to the Court of Appeals. *Id.*, 000052:1-17.

On December 17, 1997, the Court of Appeals *reversed* the judgment of the trial Court and ordered judgment in favor of MR. HOBDY, *holding that MR. HOBDY had been denied his rights to due process of law. Id.*, at 42. Thereafter, on September 28, 1998, *MR. HOBDY timely filed a Complaint in Superior Court seeking damages for the violation of his constitutional rights of Due Process.* (CT: Vol. 1:000001 entry 09/28/98 (10/09/01)). The Complaint was filed against (among others) the State, State Department of Insurance, and other Department individuals including former Commissioner Chuck Quakenbush. *Id.* The Complaint as amended alleged seven causes of action (App. 3):

(1) Deprivation of Civil Rights (42 U.S.C. section 1983),

(2) Conspiracy to Interfere with Civil Rights (42 U.S.C. section 1985),

(3) Declaratory Relief,

(4) Intentional Misrepresentation,

(5) Negligent Misrepresentation,

(6) Intentional Infliction of Emotional Distress, and

(7) Violation of Unruh Civil Rights Act (*Civil Code* sections 51.7, 52, and 52.1). (CT: Vol. 1:000041-86 (10/09/01)). (App. 3).

a. Motion For Summary Judgment By Respondents Chambers & Quakenbush.

Subsequently, Respondent Jennifer Chambers (a Department attorney) filed a Motion for Summary Judgment, or alternatively Summary Adjudication of Issues. (CT: Vol. 4:000767-799; 000804-000825 10/09/01)) (App. 5). Respondent Chamber's contended that MR. HOBDY'S first and second causes of action under 42 U.S.C. section 1983 and 1985 were barred by the 1-year statute of limitations under section 340(3) *Code of Civil Procedure*, because Chambers alleged MR. HOBDY knew her identity at the time of filing the original complaint; therefore, Chambers claimed she could not be substituted as a DOE. (CT: Vol. 4:000771:14-00077211; 000810:3-11 (10/09/01)). MR. HOBDY opposed the Motion, (CT: Vol. 5:000869-000946 (10/09/01)), and filed objections to the alleged evidence. (CT: Vol. 5:000968-974). *Id.*

MR. HOBDY argued that the Motion should be denied, because the issues of ABSOLUTE IMMUNITY and statute of limitations raised by Chambers in her Motion were not set forth in her Answer as required by law. (CT: Vol. 5:000885-887:13; 000870:4-9; 000883:9-10; 000886; 000902-903:8 (10/09/01)). Therefore, since these new matters were not pled, Chamber's Motion could not be based upon these defenses.

Chambers then filed a Reply which attached as an exhibit an *Amended Answer* attempting to set forth the statute of limitations code section and prosecutorial and

absolute immunity defenses. (CT: Vol. 5:000947-956; 000954:1-15 (10/09/01)). (App. 5).

However, on the day of the hearing on the Motion Chamber's attorney filed an *Ex Parte* Application to Amend the Answer to allege the immunity defenses, and sought (on the same day) summary judgment on the basis of the Amended Answer – even though the Motion was based upon the original Answer. (CT: Vol. 5:000963-990 10/09/01)). Attached to Chamber's application was the purported Amended Answer. *Id.*, 000988-990.

MR. HOBDY *vehemently* opposed the *Ex Parte* Application in writing. *Id.*, 000975-978. MR. HOBDY argued that it would be error for the trial court to grant the application and amend the Answer, and then consider and grant summary judgment on the basis of the Amended Answer when the Motion was based upon the original Answer. *Id.*, 000975-977:3. *This would violate MR. HOBDY'S rights to Due Process of Law under the Fifth Amendment as applied to the states through the Fourteenth Amendment.*

Nonetheless, the trial court granted the *Ex Parte* application providing Respondent Chambers leave to amend the Answer, and then granted Summary Judgment on the basis of the amended answer even though MR. HOBDY had rights to notice and an opportunity to respond to the Amended Answer. (RT: D-13:27-28-D-15:23; CT: Vol. 5:000983 (10/09/01)) (App. 26-28). However, instead of the trial court properly entering a judgment and order in favor of Respondent Chambers, the trial court entered an Order of Dismissal in favor of this Respondent and non-parties to the action. (App. 29-30).

Meanwhile Respondent Quakenbush filed a Motion for Summary Judgment or alternatively Summary Adjudication of Issues. (CT: Vol. 2:000375-000389 (10/09/01)) (App. 5). The Motion was solely based upon the Declaration of Quakenbush. *Id.*, 000375-379. Quakenbush contended he was entitled to judgment, because he alleged that there was no evidence that he had any *personal involvement* in the constitutional deprivation of MR. HOBDY'S licenses so as to be liable under 42 U.S.C. §§ 1983 and 1985. *Id.*, 000382:13-22. *Id.*

MR. HOBDY opposed the Motion for Summary Judgment. (CT: Vol. 3:000549-639; Vol. 4:000640-000647; 000663-667 (10/09/01)). MR. HOBDY showed that Quakenbush had *admitted* in discovery (interrogatories) to his personal involvement in the constitutional deprivation of MR. HOBDY'S licenses and licensing rights, and that at the very least a genuine issue of material fact existed that Quakenbush was personally involved in the constitutional deprivation of MR. HOBDY'S constitutional rights, because the evidence showed the deprivation took place at Quakenbush's direction and with his knowledge, consent, or acquiescence. (CT: Vol. 3:000549-000564; 000567-000584; 000586-Vol. 4:000647 (10/09/01)).

Nonetheless, the trial court granted judgment in favor of Quakenbush holding, that Quakenbush had no personal involvement in the constitutional deprivation of MR. HOBDY'S licenses. (RT: C-13:14-C-17:13; CT: Vol. 4:000736-738 (10/09/01)) (App. 21-25).

b. Judgment Entered In Favor Of Non-Parties.

Thereafter, the trial court permitted dismissal and judgments to be entered in favor of State of California, Department of Insurance of the State of California, Patricia K. Staggs, Jon Tomashoff, State of California Board of Control, Jennifer McColloch, John Petkovich, Victoria Pham, and Glenise Sibbern. (App. 29-30). *However, State of Cal., Department Of Ins., Staggs and Tomashoff had previously been dismissed and were parties to a prior appeal, and the other persons named had never been served with process and were never parties.* (AOB pp. 12-13 (par. 9) (CT: Vol. 1:000120 (04/04/02)). *Id.*

c. Demurrer On Behalf Of Nelson And Williams Sustained On Federal Immunity Grounds.

The trial court also sustained the Demurrer of Respondents Nelson and Williams as to all causes of action without leave to amend on all the grounds set forth by these Respondents including the fact that these State of California Department of Insurance employees allegedly had absolute and qualified immunity from suit under constitutional and federal law. (RT: G-4:20-28-G-5:1). (App. 31-33). Therefore, MR. HOBDY'S federal causes of action under 42 U.S.C. sections 1983 and 1985 were dismissed. *Id.*

d. Court Of Appeals Opinion/Supreme Court Petition For Review.

Although called to the attention of the Court of Appeals by extensive briefing and in rehearing, the Court of

Appeals affirmed the trial court's holding that Respondents had absolute and qualified immunity from suit under federal and constitutional law. (App. 19).

Also, the Court of Appeals affirmed summary judgment in favor of Quakenbush holding that under federal law this Respondent had no personal involvement in the Constitutional deprivation of MR. HOBDY'S licensing rights to subject him to liability under 42 U.S.C. sections 1983 or 1985. (App. 7-11).

Further, the Court of Appeals affirmed summary judgment in favor of Chambers and never addressed the fact that MR. HOBDY was *prejudiced* since he had been denied his Fifth and Fourteenth Amendment rights to Due Process of Law, because he was not given notice and an opportunity to the respond to the amended Answer. (App. 12-14).

Even though called to the attention of the Court of Appeals in briefing and through a Petition for Rehearing by MR. HOBDY, the Court of Appeals ignored and affirmed the judgment rendered in favor of persons/entities not parties to the action. *In fact, the Court never addressed this issue.* (App. 1-20).

MR. HOBDY filed a timely Petition for Rehearing in the Court of Appeals addressing (among other things) all of the issues set forth above which such Court denied. (App. 34). The federal and constitutional issues (as set forth above) were then raised by MR. HOBDY in his Petition for Review which he timely filed on November 5, 2003, with the Supreme Court of the State of California. (App. 44, 39-60). However, the State Supreme Court denied the Petition for Review on December 10, 2003. (App. 35).

REASONS WHY THIS UNITED STATES SUPREME COURT SHOULD GRANT THIS WRIT OF CERTIORARI

MR. HOBDY urges this high Court to grant certiorari on the important questions herein. This Court granting certiorari will afford MR. HOBDY a remedy for the violation of his Constitutional and Federal rights and protect the public at large.

First, the federal issues of absolute and qualified immunity from suit are extremely important. There presently exists a conflict between the Court of Appeals decision and decisions by this United States Supreme Court as to when a governmental employee enjoys the protections of absolute and qualified immunity from suit so as to avoid liability under 42 U.S.C. sections 1983 and 1985. *This question raises federal and constitutional concerns for all citizens. Certiorari should be granted to resolve the conflict that presently exists.*

Second, the question of what criteria under federal law will be used to determine whether a governmental official is personally involved in the constitutional deprivation of an individual's occupational licensing rights is of utmost importance. Whether, the occupational license is in the area of insurance (as in this case) or whether such license is in another area (such as engineer, attorney, architect, chiropractor, contractors, accountants, etc.) individuals all over the world will be affected by a decision which defines personal involvement narrowly rather than broadly. The lower court's narrow ruling is in direct conflict with federal opinions on this issue and this high Court has never issued an opinion on the subject. Now, this high Court by granting certiorari can set forth the criteria for the first time.

Third, this high Court's authoritative voice is needed to restore clarity and certainty to the law that individuals who are neither parties to an action nor served with process cannot have a judgment entered in their favor. Due Process of Law – to be free from judgments where one has not been given notice and an opportunity to be heard – also applies in the context of plaintiffs to be free from a judgment where they have not sued the individual. Under the lower Court's holding, a plaintiff could be liable to a person whom he or she never sued nor had any dealings with. What would be the state of Due Process? It is now time for this high Court to settle this issue in the minds of the public by granting certiorari.

Finally, Due Process of Law under the Fifth and Fourteenth Amendments gives every citizen the right to notice and an opportunity to be heard. Under the lower court's ruling – which conflicts with federal and constitutional law – due process of law is an exception and not the general rule. This high Court should grant certiorari so as to clarify the rights of Due Process and their applicability.

In short, certiorari will prevent pervasive and adverse consequences upon the public in general and the citizens of the United States in particular.

I. THERE PRESENTLY EXISTS A CONFLICT BETWEEN DECISIONS OF THE COURT OF APPEALS AND THIS U.S. SUPREME COURT WHICH REQUIRE THE AUTHORITATIVE VOICE OF THIS COURT BY THE GRANTING OF CERTIORARI.

a. The Conflict Is Direct And Readily Apparent Concerning The Issues Of Absolute And Qualified Immunity From Suit.

Lower courts need to be guided by this Supreme Court on the issue of when to apply absolute and qualified immunity from suit. Although unpublished, the current Opinion of the Court of Appeals is in direct conflict with this high Court on the applicability of immunity from suit as it is applied in the area of occupational licensing. *The Court of Appeals Opinion, in affirming the sustaining of the Demurrer without leave to amend as to Respondents Williams and Nelson, has unequivocally held that Respondents are immune from suit under 42 U.S.C. section 1983 and 1985 under principles of absolute and qualified immunity.* (App. 19, 31-33). **This is erroneous.**

This Supreme Court, in *Forrester v. White*, 484 U.S. 219, 227-228 (1988) (unanimous decision) held that, while *judicial acts* are entitled to absolute immunity, *administrative decisions* DO NOT have absolute immunity (holding, judge was acting in an *administrative capacity* when he demoted and discharged the plaintiff and consequently *was not protected by absolute judicial immunity*). "As a general rule the critical factor in determining whether a public official is entitled to absolute rather than qualified immunity is the nature of the particular act being challenged, not the office held by the defendant official." Cook & Sobiesky, *Civil Rights Actions*, Vol. 1, § 2.06[B] (1999).

"*Judicial and legislative acts* are protected by absolute immunity, while *executive or ADMINISTRATIVE acts*, by contrast, are protected *only by* qualified (assuming the public official can demonstrate entitlement to qualified immunity)." *Id.*

Here, the act in question was the summary revocation of MR. HOBDY'S over 25-year licensing rights without notice and a hearing. This is an **ADMINISTRATIVE AND NOT JUDICIAL OR LEGISLATIVE ACT UNDER ANY ANALYSIS.** Yet, the Court of Appeals affirming and the Supreme Court of the State in denying review have now held that, even in an administrative context an official can be absolutely immune from suit which is in direct conflict with this Court's opinion. *This conflict which is direct and readily apparent from the lower court's rationale and result requires the grant of certiorari Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (per curiam) (cert. granted, "because the Ninth Circuit's holding is in direct conflict with our precedents"). In short, the lower court was in error – absolute immunity did not apply concerning the administrative act of revocation of MR. HOBDY'S over 25-year licensing rights.

Further, consistent with the above reasoning this high Court has consistently *rejected* absolute immunity in the context of acts similar to this case. *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985). This Supreme court has stated that, recognition of absolute immunity is *quite sparing* – the *presumption is that qualified rather than absolute immunity* is sufficient to protect government officials in the exercise of their duty. *Burns v. Reed*, 500 U.S. 478, 486-487 (1991). Nonetheless, the current Opinion of the Court of Appeals and State Supreme Court suggests that **absolute immunity is the general rule and not the**

exception. Guidance from this Court is required by granting certiorari.

As to qualified immunity, the Court of Appeals and State Supreme Court's denial of review is also contradictory with the opinions of this high Court. This high Court waded in on the issue by its opinion in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982). In *Harlow*, this Court held that, *if a law is clearly established a qualified immunity defense should fail, because a reasonably competent public official should know the law governing his conduct.* Additionally, in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), this Court held that a right is clearly established when the contours of the right are sufficiently clear that a reasonable official would understand that what he or she is doing violates that right (i.e., due process).[3] There appears to be no decision by this Court directly on point with the facts herein. However, the pronouncement by this Court should be that as set forth in *Leland v. Mississippi State Board, etc., et al.*, 841 F.Supp. 192, 193-195, 198-200 (S.D. Miss 1993). In *Leland*, the Court held that, *the existence of a property interest in professional licensure is clearly established as is the requirement that the deprivation of that property interest be attended by due process under the Fifth and Fourteenth Amendments. Id.* Therefore, Respondents were not entitled to any absolute nor qualified immunity from suit, because the revocation was an administrative act and the right to due process of law

[3] " . . . The right to due process of law is quite clearly established by the Due Process Clause, and there is a sense in which any action that violates that Clause . . . violates a clearly established law." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

under the Fifth and Fourteenth Amendments in the area of MR. HOBDY'S insurance license is clearly established. The facts herein are not unique as shown by the *Leland* opinion which has similar facts. This Court should now grant certiorari to make a pronouncement that the rights to due process in the area of occupational licensing is clearly established as is the property interest in such license. Granting of certiorari is a matter of necessity.

II. CERTIORARI SHOULD ALSO BE GRANTED, BECAUSE THE DECISION OF THE LOWER COURT IS IN DIRECT CONFLICT WITH FEDERAL AUTHORITY AND THE AUTHORITY OF THIS SUPREME COURT.

a. This Court Should Define What Criteria Is Used To Determine Whether Personal Involvement Of A Supervisory Official In A Constitutional Deprivation Is Sufficient To Support Liability Under §§ 1983 And 1985.

The trial court, as affirmed by the Court of Appeals and the State Supreme Court in denying review held that, Respondent Quakenbush was not personally involved in the deprivation of MR. HOBDY'S constitutional rights of due process. (CT: Vol. 2:000382 (10/09/01)). (App. 5, 7-11, 21-23). However. 42 U.S.C. section 1983 states that,

> "[a]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall **SUBJECT**, or **CAUSE TO BE SUBJECTED**, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall

> . . . be liable to the party injured in any action at law. . . ." **(emphasis added)**.

(App. 37).

This high Court has held that the phrase **CAUSES** plainly imposes liability on a government official who, under color of some official policy or custom "causes" an employee to violate another's constitutional rights. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691-695 (1978). Yet, there appears to be no decision by this Court on the factors used in this criteria. The most relevant opinions on the subject held that, *where a defendant is employed in a supervisory capacity, personal involvement can include*: (1) direct participation in the violation, (2) the defendant's failure to remedy the violation after learning of it, (3) the defendant's *creation or maintenance* of the custom and policy which fostered the violation or his allowance of the custom and policy to continue after learning of it, or (4) the defendant's gross negligence in supervising subordinates who caused the violation. *Sealey v. Giltner*, 116 F.3d 47 (2nd Cir. 1997) (on remand, 997 F.Suppl. 316); *Hayes v. Sweeney*, 961 F.Supp. 467, 475 (2nd Cir. 1997) (CT: Vol. 3:000502-000548 (10/09/01)). Nonetheless, the lower court's opinion rejects such criteria to be used to demonstrate personal involvement. *Instead, the lower court required direct involvement.* What are the relevant factors to consider? Those as pronounced by federal authority, or as pronounced by the trial court and Court of Appeals in this case. Through federal law, MR. HOBDY demonstrated the personal involvement of Respondent Quakenbush which required the motion to be denied. *This Court should provide guidance on this important issue of federal law to define what criteria should be used and to provide MR. HOBDY a remedy.*

b. This Court Should Restore Certainty And Clarity To The Law Regarding Due Process In The Context Of The Issuance Of Judgments In Favor Of Persons/Entities Not Parties To The Action.

Additionally, failing to grant certiorari by this Court will have pervasive and adverse consequences upon the public and the Courts of the State of California. Under *California Rules of Court, 28(b)(2) a State Supreme Court can order review when the Court of Appeals lacked jurisdiction* – but the State Supreme (in error) failed to do so. (App. 35). As a policy matter and under the law, trial courts are not permitted to award judgments in favor of plaintiffs and against persons not parties to the action nor served with process as the trial court in this action *erroneously* did. The constitutional requirement regarding Summons (in terms of notice and opportunity to be heard) have been set forth by this U.S. Supreme Court. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Similarly, trial courts are not permitted to award judgments against plaintiffs and in favor of defendants who are not parties to the action nor served with process. (App. 29-30). How can a judgment be awarded in favor of a person who is not a party to a lawsuit? Simply, it cannot! At present, however, the Court of Appeals Opinion and the State Supreme Court's denial of review (notwithstanding its direct obligation to grant review in this context) seems to confirm the contrary. The question arises whether a Court of Appeals lacks jurisdiction in this context? *Review is necessary to restore certainty and clarity to the law of due process in California and elsewhere.*

III. FINALLY, CERTIORARI SHOULD ALSO BE GRANTED, BECAUSE THE DECISION OF THE LOWER COURT IS IN DIRECT CONFLICT WITH OTHER COURTS OF APPEALS.

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on matters among courts of appeals. See, *Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (certiorari granted where the circuits disagreed on the proper application of federal habeas corpus statute "[b]ecause uniformity among federal courts is important on questions of this order"). As a result, this Court should grant certiorari to resolve the confusing split of authority among the Court of Appeals. Namely, the Second District Court of Appeals has permitted summary judgment to be granted as to an amended pleading although MR. HOBDY was not given an opportunity to respond to such pleading. (App. 12-14, 26-27). *However, the Fourth District Court of Appeals held that such is impermissible. Perry v. Atkinson*, 195 Cal.App.3d 14, 17-18 (1987). Additionally, the State Supreme Court in *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 843 (2001) held that, an opposing party to summary judgment must be given a reasonable opportunity to oppose the motion. Although MR. HOBDY'S case did not produce a published Opinion, such Opinion can still be relied upon. *California Rules of Court*, 977. We now have a confusing split of authority among the Courts of Appeal and the State Supreme Court. If litigants can move for summary judgment without the other litigant having an opportunity to respond, a plethora of lawsuits will plague the state and federal judicial systems upon constitutional due process grounds. Litigants, as a tactical ploy, will simply amend their pleading at the time of the hearing on the motion and request summary judgment to be entered regardless

of their adversaries right to notice and an opportunity to respond. The trial court will then be permitted to grant the motion and disregard an individuals rights to due process. This Supreme Court has the obligation to clarify what amounts to a constitutional violation. Respectfully, MR. HOBDY states that this high Court must do so in the nature of granting certiorari. Simply, there is no other alternative.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be GRANTED by this Honorable Court.

Respectfully submitted,

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NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WAYMON HOBDY, Plaintiff and Appellant, v. STATE OF CALIFORNIA et al., Defendants and Respondents.	B153875 (Los Angeles County Super. Ct. No. BC198218) (Filed Sep. 25, 2003)

APPEAL from judgments of the Superior Court of Los Angeles County, Ronald M. Sohigian [sic], Judge. Affirmed.

Law Offices of Damon L. Hobdy and Damon Lamount Hobdy for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Andrea Lynn Hoch, Chief Assistant Attorney General, James M. Schiavenza, Senior Assistant Attorney General, and Joel A. Davis, Supervising Deputy Attorney General for Defendants and Respondents.

This is Waymon Hobdy's second appeal from judgments entered in his action for damages allegedly caused by the improper revocation of his insurance license by the State Department of Insurance (Department). In the first appeal we affirmed dismissal of Hobdy's claims against the State and two staff attorneys in the Department. The current appeal involves the trial court's dismissal of all claims against the remaining defendants: The trial court granted summary judgment in favor of former Insurance Commissioner Chuck Quackenbush and Department staff attorney Jennifer Chambers, sustained a demurrer and then entered judgment on the pleadings in favor of Department investigators Michael McAllister, Brian O'Brien and Melinda Aval and sustained a demurrer without leave to amend in favor of Department investigators Kim Williams and Barry Nelson. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Department summarily revoked Hobdy's insurance license in October 1995 without providing him notice and a hearing. Hobdy's petition for writ of administrative mandamus seeking withdrawal of the revocation order was denied by the superior court. We reversed in an unpublished opinion holding that Hobdy was entitled to a hearing before his license could be revoked. (*Hobdy v. State of California Department of Insurance* (Dec. 17, 1997, B103398) [nonpub. opn.].) Following issuance of our opinion, the Department reinstated Hobdy's license.

After submitting a tort claim against the Department with the State Board of Control, Hobdy filed this action against the State, the Department and Quackenbush. Hobdy subsequently added Chambers, Patricia Staggs and

Jon Tomashoff, all staff attorneys in the Department, as defendants. The operative fourth amended complaint alleges causes of action for deprivation of civil rights (42 U.S.C. § 1983) against all defendants; conspiracy to interfere with civil rights (42 U.S.C. § 1985) against all defendants; declaratory relief against all defendants; intentional misrepresentation against the attorney defendants; negligent misrepresentation against the attorney defendants; intentional infliction of emotional distress against the attorney defendants; and violation of the Unruh Act (Civ. Code, §§ 51.7, 52, 52.1) against all defendants.[1]

The trial court (Judge Linda K. Lefkowtiz) sustained without leave to amend a demurrer in favor of the State, Staggs and Tomashoff on all causes of action against them. The trial court also sustained without leave to amend a demurrer by Quackenbush and Chambers to the state law causes of action against them but overruled their demurrer to the federal civil rights causes of action on the ground their "[c]laims of qualified immunity . . . present issues of facts more properly determined at a later stage of the proceedings."[2] The trial court entered judgment in favor of the State, Staggs and Tomashoff, from which Hobdy appealed. We affirmed. (*Hobdy v. State of California* (Feb. 27, 2002, B145037) [nonpub. opn.].)

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[1] The third amended complaint, not the fourth amended complaint, is included in the record on appeal. The parties, however, agree the only change in the fourth amended complaint was the addition of the State as a defendant in the civil rights causes of action.

[2] According to the trial court's ruling, a demurrer to the declaratory relief cause of action previously had been sustained without leave to amend.

Meanwhile, Hobdy named Department investigators McAllister, O'Brien and Aval as "doe" defendants. McAllister, O'Brien and Aval demurred to the federal civil rights causes of action but not the state law causes of action, apparently assuming only the federal civil rights claims remained in the lawsuit because the other defendants' demurrers to the state law causes of action had been sustained without leave to amend. The trial court (Judge Ronald M. Sohigian) sustained the demurrer to the federal civil rights causes of action with leave to amend. Hobdy chose not to amend his pleading but rather to pursue the issue on appeal. McAllister, O'Brien and Aval filed a proposed judgment.

Before the proposed judgment was signed, however, Hobdy filed a request for entry of default against McAllister, O'Brien and Aval, which was entered by the clerk. Soon thereafter, without informing the trial court that a default had been entered, Hobdy filed an objection to the proposed judgment, contending the state law causes of action were still pending because the demurrer of McAllister, O'Brien and Aval did not address them. Still unaware a default had been entered, the trial court signed the judgment over Hobdy's objection.

After the judgment had been signed, Hobdy's counsel sent a letter to defense counsel regarding the entry of default and indicated he was planning to move to vacate the judgment. Defense counsel responded he had been unaware of the default prior to receiving Hobdy's counsel's letter, stated his belief the entry of default was void and requested that Hobdy stipulate to vacate the entry of default. Hobdy refused.

The trial court became aware that it had signed the judgment in favor of McAllister, O'Brien and Aval after their default had been entered and vacated the judgment. Then, on the motion of McAllister, O'Brien and Aval, the trial court vacated the entry of default.

Quackenbush moved for summary judgment. The trial court granted the motion on the ground Quackenbush had no personal involvement in the revocation of Hobdy's license. The court denied Hobdy's request for denial or continuance of the summary judgment motion so he could complete outstanding discovery and his motion to compel Quackenbush and the other defendants to attend depositions at locations beyond geographical limitations.

Chambers also moved for summary judgment. Her motion was based, in part, on the ground the causes of action remaining against her (the federal civil rights claims) were barred by the statute of limitations. Hobdy did not dispute the merits of the statute of limitations defense but argued in opposition that Chambers had waived the defense by failing to identify in her answer the specific section of the Code of Civil Procedure upon which she relied in arguing his claims were time barred. Chambers moved for leave to amend her answer to conform to proof to insert the appropriate section number for her limitations defense. The trial court granted leave to amend and entered summary judgment in favor of Chambers on statute of limitations grounds.

Hobdy added Kim Williams and Barry Nelson, two other Department investigators, as "doe" defendants. Williams and Nelson filed a demurrer to the fourth amended complaint. In addition, McAllister, O'Brien and Aval moved for judgment on the pleadings. The trial court

sustained the demurrer without leave to amend and granted the motion for judgment on the pleadings. The trial court then entered an order of dismissal in favor of all defendants. Hobdy filed timely notices of appeal.

CONTENTIONS

Hobdy contends: (1) triable issues of fact preclude summary judgment in favor of Quackenbush; (2) Chambers is not entitled to summary judgment on statute of limitations grounds; (3) the trial court improperly sustained a demurrer and granted judgment on the pleadings in favor of McAllister, O'Brien and Aval; and (4) the trial court improperly sustained a demurrer in favor of Williams and Nelson.

DISCUSSION

1. *The Trial Court Properly Granted Summary Judgment in Favor of Quackenbush*

a. *Standard of Review*

The standard of review on appeal from a summary judgment is now well settled: "A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) In the trial court, once a moving defendant has 'shown that one or more elements of

the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. . . . ' (Code Civ. Proc., § 437c, subd. (*o*)(2); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

In reviewing the evidence we strictly construe the moving party's evidence and liberally construe the opposing party's and accept as undisputed only those portions of the moving party's evidence that are uncontradicted. "Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial. 'Any doubts about the propriety of summary judgment . . . are generally resolved *against* granting the motion, because that allows the future development of the case and avoids errors.'" (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.)

b. *Summary Judgment Was Proper on the Basis of Quackenbush's Lack of Personal Involvement*

Hobdy attempts to impose liability on former Insurance Commissioner Quackenbush under title 42 United

States Code section 1983[3] based on Quackenbush's supervisory role in the Department. "Generally, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability under 42 U.S.C. § 1983. [Citation.] A supervisor may be liable under § 1983 only if there exists either '"(1) his or her personal involvement in the constitutional deprivation, *or* (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation."' [Citations.]" (*Jeffers v. Gomez* (9th Cir. 2000) 267 F.3d 895, 915; see also *Bergquist v. County of Cochise* (9th Cir. 1986) 806 F.2d 1364, 1369 ["It is clear that the supervisors are not subject to vicarious liability, but are liable only for their own conduct"], disapproved on another ground in *City of Canton v. Harris* (1989) 489 U.S. 378, 388 & fn. 6 [109 S.Ct. 1197, 103 L.Ed.2d 412].)

Despite this authority, Hobdy contends triable issues of fact exist as to Quackenbush's role with respect to Department policy and the revocation of his license. We disagree. Quackenbush's declaration in support of his summary judgment motion demonstrates he had no knowledge of the circumstances relating to the revocation

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[3] Title 42 of the United States Code section 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Title 42 of the United States Code is hereafter referred to as 42 U.S.C.

of Hobdy's license in particular, nor did he implement or knowingly maintain any general Department policy to revoke certain licenses without a hearing. Quackenbush declared he was unaware of Hobdy before this lawsuit was filed and made no decisions with respect to Hobdy's insurance license. Quackenbush also stated, "At no time did I review, approve or otherwise consider any preexisting policies with respect to summary revocation of licenses or the application of Insurance Code section[s] 1669 and 1738 [the statutes on which the Department relied to revoke Hobdy's license]."[4]

Hobdy is simply incorrect to suggest that Quackenbush's general duty to run the Department makes him personally responsible under 42 U.S.C. section 1983 for all decisions by Department employees. Hobdy's theory runs contrary to well established case law precluding vicarious liability under 42 U.S.C. section 1983. (See, e.g., *Hansen v. Black* (1989) 885 F.2d 642, 645-646 ["supervisory officials are not liable to actions of subordinates on any theory of vicarious liability"; chief of police not liable for actions of individual officers]; *Hunt v. Dental Dept.* (9th Cir. 1989)

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[4] Although Hobdy claims Quackenbush's declaration was inadmissible and his objections to the declaration should have been sustained, he provides no argument or citation to authority to demonstrate why he is correct. As such, he has waived on appeal his challenge to the declaration. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546 ["[I]t is established that,' . . . an appellate brief "should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." [Citation.] [¶] . . . This court is not inclined to act as counsel for . . . appellant and furnish a legal argument as to how the trial court's rulings . . . constituted an abuse of discretion' "].)

865 F.2d 198, 200 [supervisor not "vicariously liable for the fault of personnel"; director of Department of Corrections not liable for actions of prison personnel].) The trial court properly granted summary judgment for Quackenbush.[5]

The infirmities in Hobdy's cause of action against Quackenbush under 42 U.S.C. section 1983 dispose of his conspiracy cause of action under 42 U.S.C. section 1985,[6] as well, because "the absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations." (*Caldeira v. County of Kauai* (9th Cir. 1989) 866 F.2d 1175, 1182.) Moreover, Hobdy's vague allegation that the Department failed to provide him a hearing based on the fact that he is African American is insufficient to establish Quackenbush participated in a conspiracy to deprive Hobdy of his constitutional rights. (See *id.* at p. 1181 [to prove a section 1985 conspiracy, "the plaintiff must show an agreement or 'meeting of the minds' by the defendants to violate his constitutional rights"].) Indeed, Quackenbush declared

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[5] Quackenbush's interrogatory responses relied on by Hobdy, while somewhat vague and less definitive than his declaration, do not establish the requisite personal involvement for liability under 42 U.S.C. section 1983.

[6] 42 U.S.C. section 1985 provides in part: "If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

that, before this lawsuit, he did not know Hobdy, had no personal contact with Hobdy and was unaware of anything relating to his insurance license or claims regarding its revocation. Thus, summary judgment was proper on Hobdy's conspiracy cause of action.[7]

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[7] Hobdy argues the trial court erred by failing to deny, or at least continue, Quackenbush's summary judgment motion to allow him to complete outstanding discovery. (See Code Civ. Proc, § 437c, subd. (h) [requiring trial court to deny or continue a motion for summary judgment when party demonstrates "facts essential to justify opposition may exist but cannot, for reasons stated, then be presented"].) The trial court did not abuse its discretion. (See *People ex rel. Dept. of Transportation v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067, 1077 [Code Civ. Proc., § 437c, subd. (h), ruling reviewed for abuse of discretion].) Hobdy's request for a continuance was made almost three years into the litigation. Such a request late in the litigation is disfavored. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 547-548.) Moreover, the fact the discovery had not yet occurred appeared to be caused in large part by Hobdy's insistence that Quackenbush travel from Hawaii and the other defendants travel from Sacramento or San Francisco to Los Angeles for depositions beyond the geographical limitations specified by Code of Civil Procedure section 2025, subdivision (e)(1).

Hobdy also faults the trial court's denial of his motion to compel defendants to deposition beyond geographical limits (Code Civ. Proc., § 2025, subd. (e)(3)) but offers no analysis or citation to authority to demonstrate the ruling constituted an abuse of discretion. (See *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 303 ["Discovery statutes vest a wide discretion in the trial court and exercise of that discretion will be disturbed on appeal only when it can be said that there has been an abuse of discretion"].) As a result, he has waived the issue on appeal. (*Maxwell v. Board of Administration, supra*, 30 Cal.App.4th at pp. 545-546.)

2. *No Basis Exists for Reversing the Summary Judgment in Favor of Chambers*

Hobdy does not contest the merits of the trial court's ruling that the causes of action against Chambers were barred by the statute of limitations. Instead, Hobdy contends Chambers could not properly raise the statute of limitations defense because her answer, although asserting the statute of limitations as an affirmative defense, failed to identify the statute under which the causes of action against her were time barred. (See Code Civ. Proc., § 458 ["In pleading the Statute of Limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section ___ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure"].)[8] According to Hobdy, the trial court erred by allowing Chambers at the summary judgment stage to amend her answer to conform to proof by inserting the relevant section number.

"Allowance of amendments to conform to the proof rests in the sound discretion of the trial court, and abuse of discretion is not shown unless prejudice appears and unless new and entirely different issues are thus brought into the case. The greatest liberality is encouraged in this respect." (*Bidart Bros. v. Elmo Farming Co.* (1973) 35 Cal.App.3d 248, 259.) This policy of liberal allowance of amendments applies with particular force to answers so as

[8] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

not to permanently deprive a party of a defense. (*Ramos v. City of Santa Clara* (1973) 35 Cal.App.3d 93, 95.)

The trial court did not abuse its discretion. Chambers's original answer clearly asserted the statute of limitations as an affirmative defense; it simply failed to identify the specific statutory basis for the defense. Allowing an amendment to correct this failure was proper. (See *Moss Estate Co. v. Adler* (1953) 41 Cal.2d 581, 585-586 [amendment proper when "designed to cure a technical defect in a pleading otherwise adequate to put the other party on notice of the true basis of the pleader's case"]; *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945 ["under this state's liberal rules of pleading, 'the right of a party to amend to correct inadvertent misstatements of facts or erroneous allegations of terms cannot be denied.' [Citation.]"]; see generally 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1047, pp. 497-498 [amendment to plead in conformity with § 458 is proper as long as the opposing party suffers no prejudice], citing *Hopkins v. Hopkins* (1953) 116 Cal.App.2d 174, 177, 184-185.) Moreover, the section number on which Chambers relied was identified in her moving papers in support of summary judgment. Hobdy was well aware of the basis for the statute of limitations defense and had ample opportunity to argue its merit.[9] The amendment in no way prejudiced

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[9] Hobdy's assertion he would have waived the ability to contest the technical defect in Chambers's answer had he opposed the summary judgment motion on the merits of the statute of limitations defense is specious. The case on which he relies, *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7, stands for the proposition that a party cannot complain it did not receive notice of motion when it appears and defends against the merits of the motion. Nothing in that case suggests

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him or brought an entirely different issue into the case. As a result, no basis exists for reversing the summary judgment in favor of Chambers.[10]

3. *The Trial Court Did Not Err By Sustaining a Demurrer and Granting Judgment on the Pleadings in Favor of McAllister, O'Brien and Aval*

a. *The Federal Civil Rights Causes of Action*

The trial court sustained without leave to amend a demurrer to the federal civil rights causes of action against McAllister, O'Brien and Aval, finding Hobdy had not alleged actionable misconduct against those "doe" defendants because he failed to allege any ultimate facts regarding their role in license revocation. The trial court's ruling was proper. Hobdy's federal civil rights causes of action contain no allegations with respect to Department

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Hobdy could not have raised both procedural and substantive arguments in opposition to Chambers's summary judgment motion in the trial court and on appeal. His failure to do so constitutes a waiver of the issue on appeal. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issue not raised on appeal may be deemed waived]; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 ["[a]lthough . . . review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in [appellant's] brief"].)

[10] Hobdy's additional contention the trial court erred by granting summary judgment because Chambers's motion was filed before the answer was amended lacks merit. A defendant may move for summary judgment based on an affirmative defense that is to be added to the answer by way of amendment. (*Ramos v. City of Santa Clara, supra*, 35 Cal.App.3d at pp. 95-96 [failure to raise defenses in answer does not of necessity preclude the assertion of the defenses in a motion for summary judgment].)

investigators, let alone specify how they participated in license revocation in general or in the revocation of his license in particular. The "[f]ailure to plead ultimate facts subjects the complaint to *demurrer* for 'failure to state facts constituting the *cause of action*.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2003) § 6:127, p. 6-26; see § 430.10, subd. (e).)

Hobdy cannot now complain he is entitled to amend these causes of action to cure this fatal defect. Hobdy was granted leave to amend and chose to stand on his pleading. (*Hendricks v. Osman* (1946) 72 Cal.App.2d 465, 466-467 ["It is clearly the law that one who declines to avail himself of leave to amend his complaint after a demurrer thereto has been sustained . . . thereby must stand upon his pleading . . . , and if the complaint is objectionable on any ground the judgment of dismissal must be affirmed."]; see also *Rader v. Apple Valley Bldg & Dev. Co.* (1968) 261 Cal.App.2d 308, 314 ["Plaintiff's failure to take advantage of the leave given to amend and cure this defect in itself justified the judgment of dismissal"].)[11]

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[11] Hobdy's assertion the trial court could not sustain a demurrer in favor of McAllister, O'Brien and Aval on the federal civil rights causes of action because another judge previously had overruled a demurrer by Quackenbush and Chambers to those causes of action is incorrect. The federal civil rights causes of action contain specific allegations as to Quackenbush and Chambers, but, in contrast, do not mention Department investigators or their role in the summary revocation of Hobdy's license. The objections to be made by demurrer are specific to a party. (See §§ 430.10 [referring to "[t]he party against whom a complaint . . . has been filed"]; 430.40, subd. (a) [referring to "[a] person against whom a complaint . . . has been filed"].) Nothing precludes a demurrer being sustained for failure to state a cause of action as to certain parties

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b. *The State Law Causes of Action*

On February 23, 2000, before the Department investigators had been added as "doe" defendants, the trial court sustained without leave to amend a demurrer by the State and the Department staff attorneys to the state law causes of action. Hobdy argues he is entitled to pursue these causes of action against McAllister, O'Brien and Aval.

As to the causes of action for intentional and negligent misrepresentation and violation of the Unruh Act, the trial court found Hobdy had failed to comply with the claims presentation requirement of the Government Tort Claims Act (Gov. Code, § 900 et seq.) and, therefore, could not pursue those causes of action. We affirmed that ruling on appeal. (*Hobdy v. State of California* (Feb. 27, 2002, B145037) [nonpub. opn.].) Our decision operates as law of the case and precludes Hobdy from pursuing his misrepresentation and Unruh Act claims against McAllister, O'Brien and Aval. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309.)

No exceptional circumstances exist to prevent application of the law-of-the-case doctrine here. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 859 ["The law-of-the-case doctrine 'will not be adhered to where its application will result in an unjust decision.' [Citations.]"].) As we explained in our prior unpublished opinion, the facts supporting Hobdy's misrepresentation and Unruh Act causes of action are not fairly reflected in the claim he submitted to the State Board of Control. That failure forecloses his right to

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while being overruled as to other parties as to whom the complaint contains different or additional allegations.

litigate those undisclosed claims against any state defendant, those involved in the prior appeal and McAllister, O'Brien and Aval alike. (*Yu v. Signet Bank/Virginia, supra*, 103 Cal.App.4th at p. 309 ["For the 'unjust decision' exception to apply, 'there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice.' [Citation.]"].)

As to Hobdy's cause of action for intentional infliction of emotional distress, the trial court initially found on the demurrer by the Department staff attorneys that the claim was barred by the immunity provisions of Government Code sections 821.2 and 821.6. On appeal we did not reach that issue, but instead affirmed on the ground Hobdy's emotional distress cause of action against Staggs and Tomashoff was barred by the statute of limitations because it did not relate back to the filing of Hobdy's original complaint. (*Hobdy v. State of California* (Feb. 27, 2002, B145037) [nonpub. opn.].) In their motion for judgment on the pleadings, McAllister, O'Brien and Aval argued, as the trial court had originally found with respect to Staggs and Tomashoff, that the emotional distress cause of action was barred by principles of immunity. We agree.

McAllister, O'Brien and Aval are immune from liability for any actions they may have taken with respect to the revocation of Hobdy's insurance license under several different provisions of the Government Code. (Gov. Code, § 821.2 ["A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke, any . . . license . . . where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or

revoked"]; Gov. Code, § 821.6 ["A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause"]; Gov. Code, § 820.2 ["Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused"].) Hobdy does not allege any specific acts by McAllister, O'Brien and Aval and, therefore, in no way demonstrates that any conduct by the investigators with respect to his license revocation occurred outside the scope of their employment. McAllister, O'Brien and Aval cannot be liable to Hobdy for emotional distress. (See *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1435-1439 [supervisors of civil service employee who was discharged from position and then reinstated were immune from liability for the alleged intentional infliction of emotional distress].)[12]

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[12] Hobdy's contention the trial court erred by vacating the entry of default he had obtained against McAllister, O'Brien and Aval and allowing the action to proceed against them is incorrect. "It is settled that the entry of default by the clerk is a ministerial duty and that he has no authority whatever to determine the sufficiency, either as to the substance or form, of a pleading on file." (*Goddard v. Pollock* (1974) 37 Cal.App.3d 137, 143.) When the clerk entered the default, a demurrer had been sustained as to Hobdy's federal civil rights causes of action against McAllister, O'Brien and Aval; and a proposed judgment had been filed. Based on the posture of the case, the default against McAllister, O'Brien and Aval could not have been entered as simply a ministerial act. Vacating the default was therefore a proper exercise of the trial court's equitable power. (See *Baske v. Burke* (1981) 125 Cal.App.3d 38, 44 ["The doctrine of relief in equity from mistake has

(Continued on following page)

4. *The Trial Court Did Not Err By Sustaining a Demurrer Without Leave to Amend in Favor of Williams and Nelson*

a. *The Federal Civil Rights Causes of Action*

On March 23, 2001 the trial court sustained with leave to amend a demurrer to the federal civil rights causes of action as to the investigator defendants – McAllister, O'Brien and Aval. Hobdy chose not to amend his pleading. Subsequently, Hobdy named two additional investigators – Williams and Nelson – as "doe" defendants without in any way supplementing the factual allegations in the operative complaint. As with McAllister, O'Brien and Aval, the trial court properly sustained without leave to amend a demurrer to the federal civil rights causes of action in favor of Williams and Nelson on the ground Hobdy failed to state a cause of action. (See *Vincent v. Grayson* (1973) 30 Cal.App.3d 899, 905, fn. 2 ["An amendment substituting the true names of fictitious defendants is not a matter of substance because it does not change the cause of action nor affect the issues raised by the pleadings"].)

b. *The State Law Causes of Action*

For the same reasons as discussed with respect to McAllister, O'Brien and Aval, our prior decision that Hobdy failed to comply with the Tort Claims Act operates

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applied where the mistake is that of the clerk of the court"]; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981-983 [clerk's error combined with plaintiff's incorrect statement of law constituted grounds for equitable relief from default].)

as law of the case and precludes him from litigating his misrepresentation and Unruh Act causes of action against Williams and Nelson; and the intentional infliction of emotional distress cause of action is barred by principles of immunity.[13]

DISPOSITION

The judgments are affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P.J.

We concur:

WOODS, J.

MUNOZ, (AURELIO) J.*

---

[13] Hobdy also contends he should be permitted to pursue his third cause of action for declaratory relief against the Department investigators. But no actual controversy exists requiring a declaration of Hobdy's rights with respect to the revocation of his license. (See § 1060 [declaratory relief action proper "in cases of actual controversy relating to the legal rights and duties of the respective parties"].) Hobdy's prior mandamus action in which he successfully argued the Department improperly revoked his license without a hearing resolved any dispute concerning Hobdy's legal rights. This action, in contrast, seeks damages Hobdy allegedly incurred based on the suspension of his license.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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Attorneys for Defendants Chuck Quackenbush, Jennifer Chambers, Michael McAllister, Brian O'Brien, Melinda Aval

SUPERIOR COURT OF THE

STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WAYMON HOBDY, Plaintiff, v. STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE, et al., Defendants,	Case No.: BC198218 [~~Proposed~~] ORDER AND SUMMARY JUDGMENT IN FAVOR OF DEFENDANT CHUCK QUACKENBUSH (Filed Aug. 9, 2001)

On July 25, 2001, at 8:30 a.m. in Dept. 41, the motion for summary judgment or alternatively summary adjudication of issues by defendant Chuck Quackenbush was heard by the Court, the Hon. Ronald M. Sohigian, Judge. Joel A. Davis, Supervising Deputy Attorney

General, appeared for moving defendant and Damon L. Hobdy appeared for plaintiff. After hearing argument and considering the papers filed by the parties, the Court hereby grants the motion, on the following grounds:

1. There is no triable issue of material fact concerning defendant Chuck Quackenbush's lack of personal involvement in the alleged deprivation of plaintiff's civil rights in the summary revocation of his insurance license. The evidence submitted by defendant establishes that defendant was not personally involved in decisions with respect to individual insurance licenses and that defendant had no knowledge of plaintiff or his license until after this lawsuit was commenced. (Defendant's Issues nos. 1-5, Declaration of Chuck Quackenbush, ¶ 1-4). Defendant Quackenbush also made no decisions with respect to Department of Insurance policy concerning when revocation of licenses would be made without a pre-revocation hearing. (Defendant's Issue no. 5, Declaration of Chuck Quackenbush, ¶ 3.) The evidence submitted by plaintiff does not raise a triable issue of fact in this regard.

Under the Federal Civil Rights Act, direct personal involvement of an official for him to be liable for the allegedly unconstitutional acts of subordinates. (See e.g., *Jeffers v. Gomez* (9th Cir. 2001) ___ F.3d. ___ 2000 WL 33176845.) Thus, there is no merit to plaintiff's first and second causes of action.

2. There is additionally no triable issue concerning any alleged discriminatory animus on behalf of defendant Chuck Quackenbush, and as such no merit to plaintiff's second cause of action under 42 U.S.C. § 1985, which requires proof that defendant was motivated by racial, or otherwise class-based, invidiously discriminatory animus. (Defendant's Issue No. 3, Declaration of Chuck Quackenbush, ¶ 1-4.)

3. The Court does not make specific rulings on each of plaintiff's objections to evidence, but considered only such evidence as is admissible. (See *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419-1420.)

Therefore the motion for summary judgment is granted, and judgment is entered for the defendant Chuck Quackenbush and against plaintiffs. Defendant Chuck Quackenbush is awarded costs of suit in the amount of $ _____.

Dated: August 9, 2001

/s/ Ronald M. Sohigian
RONALD M. SOHIGIAN
Judge of the Superior Court

Submitted by:

Dated: August 1, 2001

BILL LOCKYER, Attorney General
of the State of California
RICHARD J. ROJO
Lead Supervising Deputy Attorney
General
JOEL A. DAVIS,
Supervising Deputy Attorney General

By: /s/ Joel A. Davis
JOEL A. DAVIS

Attorneys for Defendants Chuck Quackenbush, Jennifer Chambers, Michael McAllister, Brian O'Brien, Melinda Aval

Approved as to Form Only:

Dated: _____

LAW OFFICES OF
DAMON LAMONT HOBDY

By: _____
DAMON LAMONT HOBDY

_____

PROOF OF SERVICE

CASE NAME: ***Waymon Hobdy v.***
State of California, et al.
Los Angeles County Superior Court
Case No. BC 198218

I declare:

I am employed in the City of Los Angeles, County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 300 S. Spring Street, 5th Floor, Los Angeles, CA 90013. On August 2, 2001, I served the documents named below on the parties in this action as follows:

DOCUMENT(S) SERVED: ***[Proposed] ORDER AND SUMMARY JUDGMENT IN FAVOR OF DEFENDANT CHUCK QUACKENBUSH***

SERVED UPON: ***Damon Lamont Hobdy***
Attorney at Law
686 S. Arroyo Parkway,
Suite 189
Pasadena, CA 91105
Fax No.: (626) 794-2577

X ***(BY MAIL)*** *I caused each such envelope, with postage thereon fully prepaid, to be placed in the*

United States mail at Los Angeles California. I am readily familiar with the practice of the Office of the Attorney General for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection for express mail.

___ ***(BY UPS)*** *I am readily familiar with the practice of the Office of the Attorney General for collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by UPS for overnight delivery.*

_X_ ***(BY FACSIMILE)*** *I caused to be transmitted the documents(s)* [sic] *described herein via the fax number(s) listed above.*

_X_ ***(STATE)*** *I declare under penalty of perjury under the laws of the State of California that the above is true and correct.*

___ ***(FEDERAL)*** *I declare that I am employed in the office of a member of the bar of this court in whose direction the service was made.*

Executed on August 2, 2001 *at Los Angeles, California.*

/s/ E. Zerrudo
E. Zerrudo Declarant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 09/21/01	**DEPT.** 41
HONORABLE RONALD M. SOHIGIAN JUDGE	R. GILBERT DEPUTY CLERK
JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
HONORABLE #1 M. FONDON, CRT ASST. Deputy Sheriff	N. JANSEN, CSR #3827 Reporter

8:30 am BC198218 WAYMON HOBDY VS STATE OF CALIFORNIA 170.6 JUDGE DUKES	Plaintiff Counsel DAMON L. HOBDY [X] Defendant STATE OF CALIFORNIA Counsel DEPUTY ATTORNEY GENERAL BY: JOEL A. DAVIS [X]

NATURE OF PROCEEDINGS:

DEFENDANT JENNIFER CHAMBERS MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, SUMMARY ADJUDICATION OF ISSUES;

EX PARTE APPLICATION FOR LEAVE TO FILE AMENDED ANSWER TO FOURTH AMENDED COMPLAINT TO CONFORM TO PROOF;

Matters are called for hearing and argued.

The Court has read and considered all declarations and exhibits filed in support of and in opposition to the above motion and ex parte.

Ex Parte Application is GRANTED.

Motion for Defendant Jennifer Chambers For Summary Judgment, Or Alternatively, For Summary Adjudication Of Issues is GRANTED. The Court need not make a formal ruling for the record regarding the evidentiary objections; it has considered only relevant and competent evidence in the face of properly made evidentiary objections, and evidence to which there was no objection pursuant to Biljac Associates vs. First Interstate Bank (1990) 218 Cal.App.3d. 1410, 1419. The Court has applied the three step method referred to in Jane D. vs. Ordinary Mutual (1995) 32 Cal.App.4th 643, 649. The Court has considered recent jurisprudence regarding Code of Civil Procedure Section 437c matters.

Court finds as to the defendant/moving party there is no triable issue of material fact and that defendant/moving party Jennifer Chambers is entitled to the relief sought. Defendant has a complete defense as to the first cause of action based upon time bar and a complete defense as to the second cause of action based upon time bar.

Defendant/moving party to prepare, serve, and lodge with the Court a form of judgment suitable for the Court's signature. The material stated on the record will be the order in accordance with the full requirements under Code of Civil Procedure Section 437c(g).

Court's ruling is more fully reflected in the notes of the official court reporter this date, incorporated herein by reference.

Defendant/moving party to give written notice forthwith in accordance with law.

[MINUTES ENTERED
09/21/01
COUNTY CLERK]

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

WAYMON HOBDY Plaintiff(s) VS. STATE OF CALIFORNIA, ET AL Defendant(s)	CASE NUMBER BC198218
	ORDER OF DISMISSAL (Filed Nov. 28, 2001)

Good cause appearing therefor, the above entitled action is hereby dismissed under the provisions of Section 581 of the Code of Civil Procedure as to defendant(s) STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE OF THE STATE OF CALIFORNIA, CHUCK QUAKENBUSH, PATRICIA K. STAGGS, JON TOMASHOFF, JENNIFER CHAMBERS, STATE OF CALIFORNIA BOARD OF CONTROL, JENNIFER McCOLLOCH, JOHN PETKOVICH, VICTORIA PHAM, GLENISE SIBBERN, KIM WILLIAMS, BARRY NELSON, MICHAEL McALLISTER, BRIAN O'BRIEN AND MELINDA AVAL pursuant to the minute order of November 15, 2001.

It is further ordered that defendant(s) STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE OF THE STATE OF CALIFORNIA, CHUCK QUAKENBUSH, PATRICIA K. STAGGS, JON TOMASHOFF, JENNIFER CHAMBERS, STATE OF CALIFORNIA BOARD OF CONTROL, JENNIFER McCOLLOCH, JOHN PETKOVICH, VICTORIA PHAM, GLENISE SIBBERN, KIM WILLIAMS, BARRY NELSON, MICHAEL McALLISTER, BRIAN O'BRIEN AND MELINDA AVAL have and recover costs

against the plaintiff(s) WAYMON HOBDY in the amount of $ ___.

DATED: November 28, 2001

/s/ Ronald M. Sohigian
RONALD M. SOHIGIAN
JUDGE OF THE
SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 11/15/01	**DEPT.** 41
HONORABLE Ronald M. Sohigian JUDGE	R. GILBERT DEPUTY CLERK
HONORABLE JUDGE PRO TEM #1 M. FONDON, CRT ASST. Deputy Sheriff	ELECTRONIC RECORDING MONITOR N. JANSEN, CSR #3827 Reporter

8:30 am BC198218 WAYMON HOBDY VS STATE OF CALIFORNIA 170.6 JUDGE DUKES	Plaintiff Counsel DAMON L. HOBDY [X] Defendant STATE OF CALIFORNIA Counsel DEPUTY ATTORNEY GENERAL BY: JOEL A. DAVIS [X]

NATURE OF PROCEEDINGS:

JURY TRIAL; c/f 10/22/01, 10/29/01

FINAL STATUS CONFERENCE; c/f 10/3/01, 10/29/01

HEARING RE PROPRIETY OF JUDGMENTS; c/f 10/29/01

DEMURRER OF DEFENDANTS, KIM WILLIAMS AND BARRY NELSON, TO FOURTH AMENDED COMPLAINT; c/f 10/29/01

MOTION OF DEFENDANTS, MICHAEL MCALLISTER, BRIAN O'BRIEN AND MELINDA AVAL, TO DISMISS FOURTH AMENDED COMPLAINT, OR ALTERNATIVELY, MOTION FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS; c/f 10/29/01

Matters are called for hearing.

Defendant submits on the moving papers and the plaintiff argues.

The Court has read and considered all declarations and exhibits filed in support of and in opposition to the above demurrer and motions.

Court DENIES and OVERRULES all objections.

Demurrer of defendants, Kim Williams And Barry Nelson, To Fourth Amended Complaint is SUSTAINED without leave to amend.

Motion of Defendants, Michael McAllister, Brian O'Brien And Melinda Aval, To Dismiss Fourth Amended Complaint, Or Alternatively, Motion For Judgment On The Pleadings And To Dismiss is GRANTED.

The Court's views are those expressed in the positions taken by the State of California. The Court's order terminates the case in this Court and constitutes a dismissal of the case in its entirety. Court awards costs of suit to the defendants in the amount of $ ___ which constitutes a judgment.

Court's ruling is more fully reflected in the notes of the official court reporter this date, incorporated herein by reference.

Jury Trial/Final Status Conference/Hearing On Propriety Of Judgments are all placed off calendar.

IT IS SO ORDERED:

/s/ Ronald M. Sohigian
RONALD M. SOHIGIAN
JUDGE OF THE SUPERIOR COURT

Notice waived.

[MINUTES ENTERED
11/15/01
COUNTY CLERK]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 7

October 23, 2003

Waymon Hobdy

v.

State of California, et al.

B153875
Los Angeles County No. BC198218

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Court of Appeal, Second Appellate District,
Division Seven – No. B153875

S120295

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Dec. 10, 2003)

WAYMON HOBDY, Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al., Defendants and Respondents.

Petition for review DENIED

GEORGE
Chief Justice

The Fifth Amendment to the United States Constitution states,

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no state, without its Consent, shall be deprived of its equal Suffrage in the Senant.

The Fourteenth Amendment to the United States Constitution states,

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

42 U.S.C., section 1983 states,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

---

42 U.S.C., section 1985 (3) states,

(3) Depriving persons of rights or privileges,

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor

of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WAYMON HOBDY, an individual,	**No. S120295**
Plaintiff and Appellant	**(Los Angeles Superior Court No. BC198218)**
vs.	**Related Appeals Decided By Court of Appeals Division Seven (Superior Court Case No. BS 037131, Court of Appeal Case No. B103398, Opinion Dated December 17, 1997 & Court of Appeals Division Seven (Superior Court Case No. BC198218, Court of Appeal Case No. B145037)**
STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE OF THE STATE OF CALIFORNIA, CHUCK QUAKENBUSH, PATRICIA K. STAGGS, JON TOMASHOFF, JENNIFER CHAMBERS, and DOES 1 THROUGH 19 Inclusive,	
Defendants and Respondents.	

After An Opinion By The Court Of Appeal Second Appellate District, Division Seven, Case No. B153875

On Appeal From The Superior Court of Los Angeles, Central District of California, Honorable Judge Ronald M. Sohigan,

PETITION FOR REVIEW

(Filed Nov. 5, 2003)

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Attorney for Plaintiff and Appellant
WAYMON HOBDY

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IN THE
SUPREME COURT OF THE
STATE OF CALIFORNIA

WAYMON HOBDY, an individual, **Plaintiff and Appellant** **vs.** **STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE OF THE STATE OF CALIFORNIA, CHUCK QUAKENBUSH, PATRICIA K. STAGGS, JON TOMASHOFF, JENNIFER CHAMBERS, and DOES 1 THROUGH 19 Inclusive,** **Defendants and Respondents.**	**No. _____** **(Los Angeles Superior Court No. BC198218)** **Related Appeals Decided By Court of Appeals Division Seven (Superior Court Case No. BS 037131, Court of Appeal Case No. B103398, Opinion Dated December 17, 1997 & Court of Appeals Division Seven (Superior Court Case No. BC 198218, Court of Appeal Case No. B145037)**

After An Opinion By The Court Of Appeal Second Appellate District. Division Seven, Case No. B153875

On Appeal From The Superior Court of Los Angeles, Central District of California, Honorable Judge Ronald M. Sohigan.

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

I. INTRODUCTION

Petitioner Waymon Hobdy (**MR. HOBDY**), requests this Honorable Court to **GRANT REVIEW** of the September 25, 2003, decision of the Court of Appeals for the Second Appellate District, which *erroneously* affirmed in full the Superior Court's Order and Judgments.

A. ISSUES FOR REVIEW.

1. Does a Court of appeals lack jurisdiction to affirm a judgment entered by the trial court in favor of defendant(s) who were never served with process nor appeared in the action?

2. Does a trial court's grant of a parties Motion for Summary Judgment *on the same day* the trial court permits this party to amend its pleading, deprive the other party of its rights to **Due Process under the Fourteenth Amendment to the United States Constitution** to respond to the now amended pleading?

3. Does a trial court have the right to grant summary judgment based upon a defendant's declaration, when this defendant makes a Motion for Summary Judgment based solely upon certain denials in the declaration that are *inconsistent* with this defendant's previous discovery responses?

4. Does section 474 of the *Code of Civil Procedure* require a plaintiff to amend its pleading to allege specific facts as to a defendant (including name and involvement) when such party was added as a DOE?

B. OVERVIEW OF THIS CASE.

In 1970, MR. HOBDY was issued a life and disability insurance license by the Department of Insurance **(DEPARTMENT)**. **(CT: Vol. 1:000041; 000045-54:4 (10/09/01))**.[1] In 1986, MR. HOBDY filed an application for a fire and casualty license, and in 1987, the DEPARTMENT issued to MR. HOBDY the fire and casualty license which he applied for. ***Id.*** *MR. HOBDY'S licenses were issued free from any conditions or restrictions.* ***Id.***

In October of 1995, Respondents *summarily* revoked MR. HOBDY'S over 25-year licensing rights. **(CT: Vol. 1:000046-000052:4)**. Subsequently, MR. HOBDY filed a Petition for a Writ of Administrative Mandamus which was denied in error, and MR. HOBDY then appealed. ***Id.*****, 000052:1-17**.

On December 17, 1997, the Court of Appeals Division Seven *reversed* the judgment of the trial Court and ordered judgment in favor of MR. HOBDY, holding that MR. HOBDY had been denied his rights to due process of law. ***Id.*****, ¶ 42**. Thereafter, on September 28, 1998, MR. HOBDY timely filed a Complaint in Superior Court seeking damages for the violation of his constitutional rights of Due Process. **(CT: Vol. 1:000001 entry 09/28/98 (10/09/01))**. The Complaint was amended and alleged 7 causes of action:

---

[1] CT refers to the Clerk's Transcript, and RT to the Reporter's Transcript with the applicable page, line numbers, and paragraphs following. *Additionally, this was a consolidated appeal; therefore, the volume of the CT is indicated with a corresponding date for the appeals filed April 4, 2002, or October 9, 2001.*

(1) Deprivation of Civil Rights **(42 U.S.C., section 1983)**,

(2) Conspiracy to Interfere with Civil Rights **(42 U.S.C., section 1985)**,

(3) Declaratory Relief,

(4) Intentional Misrepresentation,

(5) Negligent Misrepresentation,

(6) Intentional Infliction of Emotional Distress, and

(7) Violation of Unruh Civil Rights Act (***Civil Code* sections 51.7, 52, and 52.1**). **(CT: Vol. 1:000041-86 (10/09/01))**.

1. **Motion For Summary Judgments By Chambers & Quakenbush**.

Subsequently, Respondent Jennifer Chambers (a Department attorney) filed a Motion for Summary Judgment, or alternatively Summary Adjudication of Issues. **(CT: Vol. 4:000767-799; 000804-000825 (10/09/01))**. Respondent Chamber's *erroneously* contended that MR. HOBDY'S first and second causes of action under 42 U.S.C., section 1983 and 1985 were barred by the 1-year statute of limitations under **section 340 (3) *Code of Civil Procedure***, because Chambers alleged MR. HOBDY knew her identity at the time of filing the original complaint; therefore, Chambers claimed she could not be substituted as a DOE. **(CT: Vol. 4:000771:14-00077211; 000810:3-11 (10/09/01))**. MR. HOBDY opposed the Motion, **(CT: Vol. 5:000869-000946 (10/09/01))**, and filed objections to the alleged evidence. **(CT: Vol. 5:000968-974)**.

MR. HOBDY argued that the Motion must be denied, because the issues of absolute immunity and statute of limitations raised by Chambers in her Motion were not set forth in her Answer as required by law. **(CT: Vol. 5:000885-887:13; 000870:4-9; 000883:9-10; 000886; 000902-903:8 (10/09/01))**. Therefore, since these new matters were not pled, Chambers's Motion could not be based upon these defenses as set forth in **section 458 *Code of Civil Procedure***, and appeals court cases of ***FPI Development v. Kakashima*, (1991) 231 Cal.App.3d. 367, 381-383; *Bostrom v. County of San Bernardino*, (1995) 35 Cal.App.4th 1654, 1663**.

Chambers then filed a Reply which improperly attached as an exhibit an *Amended Answer* attempting to set forth the statute of limitations code section and prosecutorial immunity defense. **(CT: Vol. 5:000947-956; 000954:1-15 (10/09/01))**. *Chambers conceded that her Answer was deficient and that her Motion was improperly based upon defenses not pled.*

MR. HOBDY then filed further objections to (among other things) the alleged Amended Answer of Chambers arguing that the Motion must be DENIED since such defenses were not pled, and that it would be *unprecedented* to permit Chambers to amend the Answer when the Motion was not based upon the Amended Answer. **(CT: Vol. 5:000965-000967 (10/09/01))**.

However, at the hearing Chamber's attorney filed an Ex Parte Application to Amend the Answer seeking summary judgment on the basis of the Amended Answer even though the Motion was directed to the original Answer. **(CT: Vol. 5:000963-990 10/09/01))**. Attached to

Chambers's application was the purported Amended Answer. ***Id.*, 000988-990**.

MR. HOBDY *vehemently* opposed the *Ex Parte* Application in writing. ***Id.*, 000975-978**. MR. HOBDY argued that it would be error for the trial court to grant the application and amend the Answer, and then consider and grant summary judgment on the basis of the Amended Answer when the Motion was directed to the original Answer. ***Id.*, 000975-977:3**. *This would violate Mr. Hobdy's rights to Due Process under the Fourteenth Amendment.*

Nonetheless, the trial court *erroneously* granted the *Ex Parte* application providing Respondent leave to amend the Answer, and then granted Summary Judgment on the basis of the amended answer even though MR. HOBDY had a right to notice and an opportunity to respond. **(RT: D-13:27-28-D-15:23; CT: Vol. 5:000983 (10/09/01))**.

Meanwhile Respondent Quakenbush filed a Motion for Summary Judgment or alternatively Summary Adjudication of Issues. **(CT: Vol. 2:000375-000389 (10/09/01))**. The Motion was solely based [sic] the Declaration of Quakenbush. ***Id.*, 000375-379**. Quakenbush *erroneously* contended that he was entitled to judgment, because he alleged there was no evidence that he had any personal involvement in the constitutional deprivation of MR. HOBDY'S licenses and licensing rights. ***Id.*, 000382:13-22**.

MR. HOBDY opposed the Motion for Summary Judgment. **(CT: Vol. 3:000549-639; Vol. 4:000640-000647; 000663-667 (10/09/01))**. MR. HOBDY showed that Quakenbush had *admitted* in discovery (interrogatories) to his personal involvement in the constitutional deprivation

of MR. HOBDY'S licenses and licensing rights, and that at the very least a genuine issue of material fact existed that Quakenbush was personally involved in the constitutional deprivation of MR. HOBDY'S constitutional rights, because the evidence showed the deprivation took place at Quakenbush's direction and with his knowledge, consent, or acquiescence. **(CT: Vol. 3:000549-000564; 000567-000584; 000586-Vol. 4:000647 (10/09/01))**.

Nonetheless, the trial court granted judgment in favor of Quakenbush holding, that the declaration (irregardless [sic] of the *inconsistent* discovery responses) unequivocally established Quakenbush had no personal involvement. **(RT: C-13:14-C-17:13; CT: Vol. 4:000736-738 (10/09/01))**.

2. Judgment Entered In Favor Of Persons/ Entities Not Parties To The Action.

Thereafter, the trial court permitted dismissal and judgments to be entered in favor of State of California, Department of Insurance of the State of California, Patricia K. Staggs, Jon Tomashoff, State of California Board of Control, Jennifer McColloch, John Petkovich, Victoria Pham, and Glenise Sibbern. *However, State of Cal., Department Of Ins., Staggs and Tomashoff had previously been dismissed and were parties to a prior appeal, and the other persons named had never been served with process and were never parties.* **(AOB pp. 12-13 (par. 9) (CT: Vol. 1:000120 (04/04/02))**.

3. Court Of Appeals Ruling/Petition For Rehearing.

Even though called to the attention of the Court of Appeals in briefing and through a Petition for Rehearing

by MR. HOBDY, the Court of Appeals ignored and affirmed the judgment rendered in favor of persons/entities not parties to the action. *In fact, the Court never addressed this issue.* **(Opin.)**.[2]

Additionally, the Court of appeals affirmed summary judgment in favor of Chambers and never addressed the fact that MR. HOBDY was prejudiced since he had been denied his rights to Due Process, because he was not given the opportunity to the [sic] respond to the amended pleading. **(Opin. pp. 9-11)**.

The Court of Appeals also affirmed summary judgment in favor of Quakenbush holding, that although Quakenbush discovery responses were inconsistent with his declaration, no personal involvement had been shown. **(Opin. p. 8 (fn. 5)**.

Finally, the Court held that MR. HOBDY had to plead ultimate facts even though persons were added as DOES under 474. **(Opin. pp. 14-15).**

MR. HOBDY filed a Petition for Rehearing in the Court of Appeals addressing (among other things) all of the issue set forth herein. Nonetheless, the Court of appeals denied rehearing by Order filed September 22, 2003.

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[2] A copy of the Opinion of the Court of appeals is attached.

C. WHY REVIEW BY THIS SUPREME COURT SHOULD BE GRANTED.

Respectfully, MR. HOBDY urges this Court to grant review, and contends that it would be a rank injustice of the entire legal community not to do so.

On the first question, the Court of appeals decision, if not reviewed, will have pervasive and adverse consequences upon the public and the Courts of this State. Under *California Rules of Court, 28(b)(2) this Supreme Court can order review when the Court of Appeals lacked jurisdiction.* As a policy matter, trial courts are not permitted to award judgments in favor of plaintiffs and against persons not parties to the action nor served with process. The constitutional requirement regarding Summons (in terms of notice and opportunity to be heard) have been set forth by the U.S. Supreme Court. ***Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 U.S. 306, 314, 70 S.Ct. 652, 657**. Similarly, trial courts are not permitted to award judgments against plaintiffs and in favor of defendants who are not parties to the action nor served with process. At present, the Court of appeals opinion seems to confirm the contrary. However, the questions arises whether a Court of Appeals lacks jurisdiction in this context? *Review is necessary to restore certainty and clarity to California law.*

On the second question, there currently exists a confusing split of authority among the Court of Appeals and this Supreme Court which must be resolved. Namely, the Second District Court of appeals has permitted summary judgment to be granted as to an amended pleading although MR. HOBDY was not given an opportunity to

respond to such pleadings. The Fourth District Court of Appeals held that such is impermissible. ***Perry v. Atkinson*, (1987) 195 Cal.app.3d 14, 17-18**. Additionally, this Supreme Court in *Aguilar v. Atlantic Richfield Co.*, **(2001) 25 Cal.4th 826, 843** held that, an opposing party to summary judgment must be given a reasonable opportunity to oppose the motion. Although MR. HOBDY'S case did not produce a published Opinion, such Opinion can still be relied upon. ***California Rules of Court*, 977**. If litigants can move for summary judgment without the other litigant having an opportunity to respond, a plethora of federal court lawsuits will plague the state and federal judicial systems upon constitutional due process grounds. Litigants, as a tactical ploy, will simply amend their pleading at the time of the hearing on the motion and request summary judgment to be entered irregardless [sic] of their adversaries right to notice and an opportunity to be heard. This Supreme Court has the obligation to clarify what amounts to constitutional violations. MR. HOBDY asks this Court to do so in the nature of granting review.

On the third question, this Supreme Court should grant review to add further to its ruling in ***Aguilar v. Atlantic Richfield Co.*, (2001) 25 Cal.4th 826.** Members of the bar and private citizens should know what is the appropriate standard as to moving for summary judgment. If a defendant is given the opportunity to rely upon his or her declaration when such defendant has responded to previous discovery *inconsistent* with such declaration, can summary judgment be granted upon such declaration? There is a clear answer in terms of depositions. ***D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.** Although the rule appears logically applicable to other discovery (such as interrogatories). Supreme Court review

is necessary to decide this important question so that the law is clearly stated.

On the last question, what is the appropriate pleading standard when a plaintiff amends to add a DOE? Is the plaintiff required to file another amendment to allege the name and involvement of a defendant even though such defendant is added to the lawsuit as a DOE and the plaintiff has followed **section 474 *Code of Civil Procedure*** in pleading the DOE? This Court should accept this case so that a clear statement of the rule can be formulated. MR. HOBDY urges this Court to accept review to assist his case and future cases.

D. ARGUMENT.

1. REVIEW BY THIS SUPREME COURT SHOULD BE GRANTED, BECAUSE THE BENCH AND THE BAR SHOULD BE PROVIDED WITH A CLEAR STATEMENT OF THE LAW AS TO WHEN A COURT OF APPEALS LACKS JURISDICTION TO AFFIRM A TRIAL COURT RULING.

Personal and Subject Matter Jurisdiction are never ending concerns of members of the bar, the bench and litigants. Acquiring jurisdiction over a person is the premier issue with respect to instituting a lawsuit. More to the point, when is jurisdiction acquired and when it is not acquired. The U.S. Supreme Court has waded in with its opinion. ***Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306; *Greene v. Lindsey*, (1982) 456 U.S. 444, 450-451; 102 S.Ct. 1874, 1878-79.** The Courts of Appeal and this Court have also addressed the matter. *The policy matter is quite obvious – so that individuals are*

afforded due process under the 14th Amendment to the United States Constitution. Unfortunately, however, trial courts enter and Courts of Appeal affirm judgments in favor of persons not parties to the action nor served with process. There appears to be a void in terms of legal authorities on whether a Court of Appeals has jurisdiction over persons who (although a judgment is entered in their favor) were never parties to the action nor served with process. **California Rules of Court, 28 (b)(2)** attempts to rectify this problem by permitting this Supreme Court to grant review when the Court of Appeals lacks jurisdiction. MR. HOBDY contends this is such a case. Nonetheless, it is necessary that litigants, the bench, and the bar have a clear statement of the rule. The apparent confusion if not resolved will almost certainly appear before this Supreme Court in the near future.

2. REVIEW BY THIS SUPREME COURT SHOULD ALSO BE GRANTED, BECAUSE ISSUES CONCERNING DUE PROCESS IN THE CONTEXT OF SUMMARY JUDGMENT MOTIONS AND THE STANDARDS TO APPLY TO SUCH MOTIONS HAVE REPEATEDLY BEEN IMPORTANT QUESTIONS OF LAW REQUIRING UNIFORMITY IN DECISION WARRANTING FURTHER EXPLANATION BY THIS HIGH COURT.

The important legal questions placed before this high court require involvement in terms of accepting review. Currently, the Court of Appeals has permitted a litigant to amend its pleading on the day of the summary judgment hearing and then granted summary judgment based upon such amended pleading even though the motion was addressed towards the superseded and not amended

pleading and even though the other litigant (MR. HOBDY) was not given notice and an opportunity to respond to the amended pleading in the context of the motion. Due process under the 14th Amendment to the U.S. Constitution would require, at a minimum, the trial court to continue such hearing to permit a litigant the opportunity to respond. This Supreme Court in *Aguilar* stated as much. *Supra.* Nonetheless, this Court now has the opportunity to guide trial courts and litigants in the correct direction to take when a party seeks an amendment on the same day of a summary judgment hearing. This will not be the last case that comes before this Court on this issue, because the Attorney General's Office (who represents the Respondents) will undoubtedly appear before another Court, and section 473 of the *Code of Civil Procedure* (in terms of amendments) will undoubtedly never be repealed. Since this is so – another private person or entity and the trial court will be faced with the undaunting task of what appropriate course of action to take. *If now guided by this high court, the appropriate action will be clear. It is urgent that this high Court step in to correct statewide practices of the law.*

Furthermore, this high court should address the appropriate standards to apply when a person moves for summary judgment. Although addressed in *Aguilar*, supra, such case does not address the issue of inconsistency in discovery responses versus a moving declaration. The Court of Appeals seemed to be unsure about how to handle such a matter. (**Opin. p. 8 (fn.5).** Taking the Court of Appeals view, a litigant could say one thing in discovery (interrogatory responses) and another thing in a Declaration. Nonetheless, such individual could still rely upon his or her Declaration in requesting the trial court to grant

summary judgment. *Is this a correct statement of the law?* Or is the correct statement such that the individual is bound in discovery by its admissions (whether through depositions, interrogatories, or requests for admissions). What standard to apply needs to be now addressed by this Court. This Court, in the context of this case, can simply expand its analysis of *Aguilar* so that a clear statement of the law in terms of summary judgment is laid down. MR. HOBDY urges this Court to now accept review.

3. THE PUBLIC POLICY OF THIS STATE FAVORS THAT THIS SUPREME COURT GRANT REVIEW OF THIS CASE.

Issues concerning jurisdiction over persons, summary judgment, and pleading will continue to be matters of importance to the bench and members of the bar including private citizens. Treatise and other secondary material cover matters which in the law appear to be unclear. However, now this Court can make clear statements of the law. There is a strong public policy in favor of permitting a party its day in Court so that such party is not left without a remedy. *MR. HOBDY is currently left without a remedy if review is not granted by this Court. Other litigants will be faced with these same issues and also left without a remedy.* To avoid such harshness, review should be granted. Correcting discrepancies in jurisdiction, summary judgment, and pleading will favor and foster current law and jurisprudence.

E. CONCLUSION

MR. HOBDY urges this Court to grant review as such is appropriate under ***California Rules of Court*, 28**

(b)(1)(2). *Issues of jurisdiction, summary judgment, and pleading will almost invariably be at the cornerstone of litigation whether instituted in federal or state courts.* This Court is given an opportunity to resolve matters involving federal law in the context of a state case. The questions before this Court are ones of statewide significance which, if not reviewed, will undoubtedly arise again. For these reasons, the issues presented are appropriate for review by this Supreme Court. Review should be GRANTED. **DATED: THIS 4 day of NOVEMBER 2003.**

/s/ Damon L. Hobdy
Damon L Hobdy, Esq.
LAW OFFICES OF
DAMON L. HOBDY
Attorney At Law
Attorney for Plaintiff
and Appellant
WAYMON HOBDY

PROOF OF SERVICE

I am a resident in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is as follows:

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On November 4, 2003, I served the foregoing document(s) described as **PETITION FOR REVIEW** on the interested parties in this action by placing the original XX a true copy thereof enclosed in a sealed envelope addressed as follows:

Joel A. Davis, Esq.
Office of the Attorney General
300 S. Spring Street, Room 5212
Los Angeles, California 90013
Attorney for Respondents

Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, California 90012
C/O Hon. Judge Ronald M. Sohigan
Department 41

Court of Appeals, State of California
Second Appellate District
300 S. Spring Street, NORTH TOWER
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C/O Clerk of the Court of Appeals

Waymon Hobdy, Appellant
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XX (BY MAIL)

XX I am readily familiar with the business s practice of collection and processing of documents for mailing with the United States Postal Service. Under that practice it would be deposited with the U.S. Postal Service on the same day as the day of collection in the ordinary course of business. I deposited such envelope in the mail at the Post Office in Pasadena, California regularly maintained by the United States Postal Service. The sealed envelope was mailed first-class with postage thereon fully prepaid on the above date following ordinary business practices.

XX I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 4, 2003, at Pasadena, California.

/s/ Damon L. Hobdy, Esq.

DAMON L. HOBDY, ESQ.

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

WAYMON HOBDY, an individual, **Plaintiff and Appellant** **vs.** **STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE OF THE STATE OF CALIFORNIA, CHUCK QUAKENBUSH, PATRICIA K. STAGGS, JON TOMASHOFF, JENNIFER CHAMBERS, and DOES 1 THROUGH 19 Inclusive,** **Defendants and Respondents.**	**No. _____** **(Los Angeles Superior Court No. BC198218)** **Related Appeals Decided By Court of Appeals Division Seven (Superior Court Case No. BS 037131, Court of Appeal Case No. B103398, Opinion Dated December 17, 1997 & Court of Appeals Division Seven (Superior Court Case No. BC 198218, Court of Appeal Case No. B145037)**

After An Opinion By The Court Of Appeal Second Appellate District, Division Seven, Case No. B153875

On Appeal From The Superior Court of Los Angeles, Central District of California, Honorable Judge Ronald M. Sohigan,

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[APPELLANT'S COUNSEL'S CERTIFICATE OF COMPLIANCE – CRC 14]

Pursuant to *California Rules of Court*, 14 the following certification is made by Damon L. Hobdy, Esq., who is counsel of record for Plaintiff and Appellant Waymon Hobdy. This brief (i.e., petition for review) was produced by means of a computer and does not exceed 14,000 words, including footnotes. The number of words contained in this brief (excluding table of contents and authorities) is 3,424 words as indicated by the word count on the computer program used to prepare the brief. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed on November 4, 2003, at Pasadena, California.

/s/ Damon L. Hobdy, Esq.
Damon L. Hobdy, Esq.